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TELESOCIAL, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TELESOCIAL, INC.,

Plaintiff,

vs.

ORANGE S.A., et al.,

Defendants.

CASE NO. 3:14-CV-03985-JD

TELESOCIAL'S TRIAL BRIEF

Judge: Hon. James Donato

Ctrm.: 11, 19th Floor

Action Filed: Sept. 2, 2014

FAC Filed: Dec. 15, 2014

Trial Date: April 10, 2017

Pursuant to Paragraph 4 of this Court’s Standing Order for Civil Jury Trials, Plaintiff Telesocial, Inc. (“Telesocial”) hereby submits this Trial Brief “specifying each cause of action and defense remaining to be tried along with a statement of the applicable legal standard.”

I. INTRODUCTION

Telesocial asserts claims against Defendants for violations of the Federal Computer Fraud and Abuse Act (“CFAA”) (Count I), violations of the California Comprehensive Computer Data Access and Fraud Act (“CCDAFA”) (Count II), breach of the Telesocial Terms of Use (Count III), breach of the covenant of good faith and fair dealing implied in the Telesocial Terms of Use (Count IV), misappropriation of Telesocial’s trade secrets (Count V), and unfair competition against Defendant Orange, S.A. (Count VI).

On January 25, 2017, Defendants moved for summary judgment seeking complete dismissal of all six of Telesocial’s claims. (D.E. 198). At a hearing on March 9, 2017, the Court denied Defendants’ motion for summary judgment in its entirety as to four of those claims, upholding Telesocial’s Count I (CFAA), Count II (CCDAFA), Count V (trade secret misappropriation), and Count VI (unfair competition).

The Court granted, in part, Defendants’ motion for summary judgment as to Count III (breach of contract) and Count IV (breach of the covenant of good faith and fair dealing), imposing some limitations on those claims.¹ The causes of action and defenses remaining to be tried in this case, along with a statement of the applicable legal standard are set forth below.

II. TELESOCIAL’S CAUSES OF ACTION

A. Federal Computer Fraud and Abuse Act

Telesocial alleges that Orange and each of the Individual Defendants violated three separate provisions of the Federal Computer Fraud and Abuse Act (“CFAA”): 18 U.S.C. §1030(a)(2)(C), (a)(4), and (b). The applicable legal standard for this cause of action is set forth in 18 U.S.C. §1030, et seq.

¹ Telesocial has not yet received a transcript of the hearing this morning on Defendants’ motion for summary judgment, nor a written ruling on the motions, and thus reserves all rights regarding the scope of its claims pending receipt of a final order on those claims, including Counts III and IV.

(a) Whoever—

* * * * *

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

* * * * *

(C) information from any protected computer;

* * * * *

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period;

* * * * *

shall be punished as provided in subsection (c) of this section.

(b) Whoever conspires to commit or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

B. California Comprehensive Computer Data Access and Fraud Act

Telesocial alleges that Orange and each of the Individual Defendants violated four separate provisions of California Penal Code Section 502, known as the California Computer Data Access and Fraud Act (“CDAFA”): Section 502(c)(1), 502(c)(2), 502(c)(6), and 502(c)(7) as well as conspiracy to violate these provisions. The applicable legal standard for this cause of action is set forth in Cal. Pen. Code § 502(c), et seq. and cases applying this statute. *See, e.g., Facebook, Inc. v. Power Ventures, Inc.*, 828 F.3d 1068, 1079 (9th Cir. 2016), *as amended on denial of reh’g* (Dec. 9, 2016).

Section 502(c) provides:

(c) Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense:

(1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.

(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

* * * * *

(6) Knowingly and without permission provides or assists in providing a means of accessing a computer, computer system, or computer network in violation of this section.

(7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.

C. Breach of Contract

Telesocial alleges that Orange and each of the Individual Defendants are liable for breach of contract. Specifically, Telesocial alleges that Orange and each of the Individual Defendants agreed to Telesocial's Terms of Use prior to gaining access to Telesocial's Call Friends application. Telesocial's Terms of Use state: "All use of the Telesocial API, its code, any docs, SDK™, content, and related materials made available to you is subject to and must comply with these Terms of Use." The Terms of Use further require that registered users agree "not [to] enable the following": "[s]elling, renting, leasing, subleasing, sub licensing, distributing, reselling or in any other way publishing the Telesocial API or service to any third parties which may develop derivative works without our approval"; "use [of] the service in any competitive purpose"; and "use of the service in any way that is unlawful." The Terms of Use further provide, in Section 2, restrictions on "Use of the Telesocial Network" as follows: "Use of the Telesocial service should not include reverse engineering the system or service or doing malicious things to our features, functionality and service via our API and SDK. You will not attempt to sabotage the Telesocial service, interfere with it, attempt to disrupt or disable any of our API servers or conduct any attacks. Your use of the Service may be terminated at any time for any reason whatsoever, and you must respect the Intellectual Property contained within our site and Service."

To determine whether a binding contract has been formed over the Internet, the dispositive questions are (1) did the offeror provide reasonable notice of the proposed terms, and (2) did the offeree unambiguously manifest assent to those terms. Telesocial must show either that: (1) the

1 Defendant had actual notice of the Terms of Use; or (2) the Defendant had constructive notice of the
 2 Terms of Use, which means that the notice on Telesocial's website or application would have put a
 3 reasonably prudent user on inquiry notice of the terms of the contract, based on the design and content
 4 of Telesocial's website or application. Each Defendant contends that a contract was not created
 5 because they never manifested assent to the terms of Telesocial's Terms of Use. To overcome this
 6 contention for any particular Defendant, Telesocial must prove that the Defendant acknowledged the
 7 agreement before proceeding to use Telesocial's application. While passively viewing a website does
 8 not manifest assent to an agreement, clicking a dual-purpose box that requires a user to agree to the
 9 Terms of Use on a website is sufficient to form a contract. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d
 10 1171 (9th Cir. 2014); *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155 (N.D. Cal.
 11 2016).

12 **D. Breach of Covenant of Good Faith and Fair Dealing**

13 Telesocial alleges that Orange and each of the Individual Defendants are liable for breach of
 14 the covenant of good faith and fair dealing. Telesocial and Defendants were parties to the Terms of
 15 Use, and Defendants owed a duty of good faith and fair dealing to Telesocial arising therefrom.
 16 Telesocial abided by the Terms of Use. Defendants breached their duty of good faith and fair dealing
 17 by unfairly interfering with Telesocial's right to receive the benefits of the Terms of Use. In
 18 particular, Defendants unfairly interfered with Telesocial's right to restrict access to legitimate users
 19 and/or limit use of the Telesocial's Call Friends application only for lawful and noncompetitive
 20 purposes, and in such a manner that Telesocial API or service would not be distributed or any other
 21 way published to any third parties that may develop derivative works without Telesocial's approval.

22 To establish this claim, Telesocial must prove the following by a preponderance of the
 23 evidence: (1) that Telesocial and the Defendant entered into a contract; (2) that Telesocial did all, or
 24 substantially all of the significant things that the contract required it to do; (3) that the Defendant
 25 unfairly interfered with Telesocial's right to receive the benefits of the contract; and (4) that Telesocial
 26 was harmed by the Defendant's conduct. *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 349–350
 27 (2000).

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E. California Uniform Trade Secrets Act

Telesocial alleges that Orange and each of the Individual Defendants are liable for misappropriation of Telesocial's trade secrets. The applicable legal standard for this cause of action is set forth in Cal. Civ. Code § 3426, et seq. "Trade secret misappropriation occurs whenever a person: (1) acquires another's trade secret with knowledge or reason to know 'that the trade secret was acquired by improper means' (§ 3426.1, subd. (b)(1)); (2) discloses or uses, without consent, another's trade secret that the person '[u]sed improper means to acquire knowledge of' (id. subd. (b)(2)(A)); (3) discloses or uses, without consent, another's trade secret that the person, '[a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was' (a) '[d]erived from or through a person who had utilized improper means to acquire it' (id. subd. (b)(2)(B)(i)), (b) '[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use' (id. subd. (b)(2)(B)(ii)), or (c) '[d]erived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use' (id. subd. (b)(2) (B)(iii)); or (4) discloses or uses, without consent, another's trade secret when the person, '[b]efore a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake' (id. subd. (b)(2)(C))." *DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal.4th 864, 874 (2003); *Altavion, Inc. v. Konica Minolta Sys. Lab. Inc.*, 171 Cal. Rptr. 3d 714, 725-27 (Cal. Ct. App. 2014).

F. California Unfair Competition Law

Telesocial alleges that Orange violated the California Unfair Competition Law. Under this law, an "unlawful business act or practice" may include any business practice that violates state or federal law. Orange violated the California Unfair Competition Law by engaging in the following: (1) violating and/or causing their agents and employees to violate the Federal Computer Fraud and Abuse Act; (2) violating and/or causing their agents and employees to violate the California Comprehensive Computer Data Access and Fraud Act; and (3) using and/or causing their agents and employees to use fictitious names and identities to conceal the aforementioned violations whether intentionally or negligently. *See* Cal. Bus. & Prof. Code § 17200; *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1992); *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 838-

39 (Cal. Ct. App. 1994) (“The ‘unlawful’ practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.”); William L. Stern, Bus. & Prof. C. §17200 Practice, § 3:56 (2010) (paraphrased).

III. DEFENDANTS’ DEFENSES

A. Federal Computer Fraud and Abuse Act

Defendants deny that they meet certain elements of the Federal Computer Fraud and Abuse Act, but do not raise any affirmative defenses to this claim. (D.E. 235 at 5).

B. California Comprehensive Computer Data Access and Fraud Act

Defendants deny that they meet certain elements of the California Computer Data Access and Fraud Act, but do not raise any affirmative defenses to this claim. (D.E. 235 at 6).

C. Breach of Contract

Defendants deny that they meet certain elements of Telesocial’s breach of contract claim. Defendants also raise the affirmative defense of failure to mitigate damages. (D.E. 235 at 8-9).

D. Breach of Covenant of Good Faith and Fair Dealing

For Telesocial’s breach of the covenant of good faith and fair dealing claims, Defendants raise the same defenses that they raise for Telesocial’s breach of contract claims. (D.E. 235 at 8-9).

E. California Uniform Trade Secrets Act

Defendants deny that they meet certain elements of Cal. Civ. Code § 3426. In addition, Defendants raise the affirmative defense that Telesocial’s trade secrets were “readily available.” *See San Jose Constr. v. S.B.C.C., Inc.*, 155 Cal. App. 4th 1528, 1542-43 (Cal. App. Ct. 2007). Specifically, Orange contends “trade secrets” were publicly available and ascertainable through the normal use of the publicly available Call Friends application. Orange agrees that it bears the burden of proof on this claim. (D.E. 235 at 7-8).

F. California Unfair Competition Law

Defendants have not raised any specific defenses to this claim. (D.E. 235 at 8). Defendants moved for summary judgment seeking a finding that Telesocial’s unfair competition

1 claims are preempted by its trade secret misappropriation claims, but the Court denied Defendants'
2 motion at the March 9, 2017 hearing.

3 Respectfully submitted,

4
5 TELESOCIAL, INC.

6 By its attorneys,

7 /s/ Todd M. Briggs

Todd M. Briggs

8 QUINN EMANUEL URQUHART &
9 SULLIVAN, LLP

Dated: March 9, 2017